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NO. 89-156
IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1989

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF PUBLIC WELFARE, et al.,
Petitioners

v.

EDWARD J. AND DEBORA A. DAVENPORT,
Respondents

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether criminal restitution orders are dischargeable debts in proceedings under Chapter 13 of the Bankruptcy Code.

LIST OF ALL PARTIES

The petitioners are the Commonwealth of Pennsylvania, Department of Public Welfare and the Adult Probation and Parole Department of the Court of Common Pleas of Bucks County, Pennsylvania. Respondents are Edward J. Davenport and Debora A. Davenport.

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v.

EDWARD J. AND DEBORA A. DAVENPORT,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF OF THE PETITIONERS

OPINIONS BELOW

The opinion of the United States Bankruptcy Court for the Eastern District of Pennsylvania is reported at 83 B.R. 309 (Bankr. E.D.Pa. 1988) and is reprinted in the appendix to the petition at p. 68a-102a. The opinion of the

District Court is reported at 89 B.R. 428 (E.D.Pa. 1988) and is reprinted in the appendix to the petition at p. 59a-66a. The opinion of the Court of Appeals is reported at 871 F.2d 421 (3d Cir. 1989) and is reprinted in the appendix to the petition at p. 1a-58a.

JURISDICTION

The United States Court of Appeals for the Third Circuit rendered its decision on March 28, 1989. The Commonwealth of Pennsylvania petitioned the Court for rehearing, and its petition was denied by order of April 27, 1989. The Commonwealth filed its petition for certiorari on July 26, 1989 and the Court granted the petition on October 2, 1989. The Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case concerns primarily the following provisions of the Bankruptcy Code: 11 U.S.C. § 101(4) and (11) defining "claim" and "debt"; 11 U.S.C. § 523 pertaining to exceptions to discharge, and 11 U.S.C. § 1328 concerning the effect of discharge. Petitioners will also refer to Pa. Stat. Ann., tit. 62 § 481 (Purdon Supp. 1989) in which the crime of welfare fraud is defined and the penalty specified, and to 18 Pa. Cons. Stat. Ann. § 1106 (Purdon 1983) pertaining to criminal restitution orders. These statutes are set forth in the petition, at 6-11.

STATEMENT OF THE CASE

1. This case presents the issue of whether the respondents, having pled guilty to welfare fraud and having been sentenced to pay restitution as a condition of their probation, may discharge that portion of their criminal sentence by completing proceedings under Chapter 13 of the Bankruptcy Code. A Chapter 13 debtor who successfully completes his plan receives a discharge, with limited exceptions, of all "debts" as that term is used in the Bankruptcy Code. The question in this case is whether criminal restitution orders are "debts" and hence dischargeable. In Kelly v. Robinson, 479 U.S. 36 (1986), the Court expressed "serious doubts" id. at 50, about whether Congress intended criminal restitution obligations to be debts, but the Court did not resolve the

issue. Kelly arose under Chapter 7 of the Bankruptcy Code, which contains broader exceptions to discharge than does Chapter 13.[1] The Court held that one of these, codified at 11 U.S.C. § 523(a)(7), exempted criminal restitution obligations from discharge under Chapter 7, and thus found it unnecessary to decide whether they are "debts" in the first place. Id. This case presents that question.

2. The respondents pled guilty to welfare fraud in September of 1986. Joint App. 28a. They had unlawfully received $2,853.80 in cash assistance and $1,291.00 in food stamps. Joint App. 56a-57a, 63a-64a. The Court of

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[1]The scope of a Chapter 7 discharge is codified at 11 U.S.C. § 727, that of a Chapter 13 at 11 U.S.C. § 1328. The respondents were discharged pursuant to § 1328(a), which does not incorporate the exception of § 523(a)(7).

Common Pleas sentenced them to one year probation, and ordered each to pay restitution in the amount of $2,072.40, at the rate of $208.00 each per month beginning in December 1986. Joint App. 28a-29a.

Pennsylvania law requires that restitution be a part of the sentence in cases of welfare fraud, Pa. Stat. Ann., tit. 62, § 481 (Purdon Supp. 1989), and that restitution payments be made to the County Court probation office, which maintains records and forwards the payments to the victim. 18 Pa. Cons. Stat. Ann. § 1106(e)(Purdon 1983). In the event of nonpayment, the probation officer can request the court to hold hearings to determine, in the first instance, whether there was a failure to make restitution and, if so, whether this failure constitutes a violation of the conditions of probation.

Id. at § 1106(f). If a violation occurred, the court, where appropriate, can find a defendant in contempt of court or revoke his probation. The Pennsylvania statute, however, does not authorize the court or the victim to enforce the criminal judgment through civil means such as attachment or lien. Id.

The respondents made no restitution payments, but in May of 1987 filed a joint petition under Chapter 13 of the Bankruptcy Code. Their petition listed the criminal restitution obligations as a debt payable to the Department of Public Welfare. Joint App. 17a-18a.

Chapter 13 bankruptcy governs the adjustment of debts of individuals with regular income. Under Chapter 13, the debtor remains in possession of his

assets, but commits his "disposable income" (defined at 11 U.S.C. § 1325) from future earnings to a repayment plan for distribution to creditors. 11 U.S.C. §§ 1321, 1322. Upon completion of the plan, the debtor is discharged.

Having received no restitution payments from the respondents after they filed for bankruptcy, the Bucks County Probation Office conducted a pre-violation hearing. Joint App. 34a. Shortly thereafter, the respondents initiated an adversary proceeding in Bankruptcy Court naming as defendants the Department of Public Welfare and the Probation Department and asking for a declaration that the restitution order was a dischargeable debt. Joint App. 26a-38a.

3. The Bankruptcy Court held that the restitution order was a dischargeable, unsecured "debt". Pet. App.

104a. The District Court reversed, holding that the restitution order was not a "debt" since the victim did not possess a "right to payment," and concluding that a discharge of the ordered restitution would both ignore this Court's direction in Kelly v. Robinson, 479 U.S. 36 (1986), and violate principles of federalism enunciated in Younger v. Harris, 401 U.S. 37 (1971). Pet. App. 59a-67a. Subsequently, the respondents having completed their plan,[2] the Bankruptcy Court ordered their "debts" discharged.

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[2]Because of the pending litigation concerning dischargeability, the parties entered into a stipulation which provided that all restitution payments were to be paid into an escrow account and would be relinquished to the prevailing party upon exhaustion of all appeals. Joint App. 47a-55a. The failure to make restitution during this period, however, would not result in revocation of probation. Id. at 49a.

4. The Court of Appeals reversed and remanded with directions to affirm the order of the Bankruptcy Court.[3] Pet. App. 1a-58a. The Court of Appeals conceded that the majority of bankruptcy courts considering the issue have rejected the contention that a criminal restitution obligation is a "debt" under the Bankruptcy Code.[4] The Court also recognized that in Kelly this

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[3]On appeal, this case was consolidated with two others in which the District Court had held that restitution orders are not dischargeable debts. Because the debtors in those cases had not yet completed their Chapter 13 plans or received their discharges, the Court of Appeals held that those cases were not ripe for decision. Pet. App. 12a-13a.

[4]See, e.g., In re Norman, 95 B.R. 771 (Bankr. D. Colo. 1988); In re Johnson, 32 B.R. 614 (Bankr. D. Colo 1983); In re Magnifico, 21 B.R. 800 (Bankr. Ariz. 1982); In re Oslager, 46 B.R. 58 (Bankr. M.D.Pa. 1985); In re Kohr, 82 B.R. 706 (Bankr. M.D. Pa. 1988);

(FOOTNOTE CONTINUED ON NEXT PAGE)

Court declared that it had "serious doubts" as to whether Congress intended criminal restitution orders to constitute "debts." Indeed, the Court of Appeals went so far as to state that "facially there is considerable merit" to arguments against treating them as such. Pet. App. 17a-19a.

Nevertheless, the Court of Appeals held that such orders are dischargeable "debts." The Court of Appeals relied upon the idea that Congress intended the broadest possible definition of the word "debt," holding

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(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

In re Pellegrino, 42 B.R. 129 (Bankr. D.Conn. 1984); In re Mead, 41 B.R. 838 (Bankr. D. Conn. 1984); Robinson v. McGuigan, 45 B.R. 423 (Bankr. D. Conn. 1984), rev'd sub nom. In re Robinson, 776 F.2d 30 (2d Cir. 1985), rev'd sub nom. Kelly v. Robinson, 479 U.S. 36 (1986); In re Button, 8 B.R. 692 (Bankr. W.D.N.Y. 1981).

that the victim's right to obtain a civil judgment and the Probation Department's right to enforce the restitution order satisfied the Code's "right to payment" requirement. Pet. App. 23a-26a.

The Court of Appeals looked also to Chapter 7, and to the provisions governing the automatic stay of proceedings in other courts. Chapter 7 exempts fines, penalties, and forfeitures from discharge and 11 U.S.C. § 362(b)(1) exempts from the automatic stay the commencement or continuation of criminal proceedings against the debtor. The Court of Appeals reasoned that the exception contained in Chapter 7 would not be necessary if criminal judgments were not "debts," and noted that Congress had expressly excepted criminal proceedings from the automatic stay but

had failed to except criminal judgments from the broad definition of "debts." Pet. App. 30a, 34a.

The Court of Appeals added that its decision "comports with Congress' objective of encouraging debtors to select the repayment option available under Chapter 13, rather than to opt for straight liquidation under Chapter 7," Pet. App. 31a, (footnote omitted) and emphasized the broader discharge available to debtors under Chapter 13.

The Court of Appeals noted this Court's "admonition that 'the States' interest in administering their criminal justice systems free from federal interference is one of the most powerful of the considerations that should influence a court considering equitable types of relief" (Pet. App. 40a, quoting Kelly, 479 U.S. at 49), but said that Congress,

not the courts, must "cure any perceived 'defects' in [the Bankruptcy Code]... which arguably affect state criminal proceedings." Pet. App. 40a.

Judge Hutchinson dissented. Pet. App. 43a-58a. He wrote that "the concerns which prompted the Supreme Court's reservations [in Kelly] require a conclusion that restitution obligations imposed as part of criminal sentences are not debts and therefore are not subject to discharge in bankruptcy." Pet. App. 45a. The broader discharge provisions of Chapter 13 do not, in his view, alter this basic conclusion, nor do they determine in the first instance whether a criminal restitution order is a debt. Pet. App. 58a, n.5. In consideration of the pre-Code treatment of criminal sanctions, the Court's direction in Kelly, and the absence of

clear legislative intent to alter pre-Code practice, Judge Hutchinson could not conclude "that Congress intended such a far reaching intrusion on the states' administration of their criminal justice system as the majority's result entails." Id.

The Court granted certiorari.

SUMMARY OF ARGUMENT

Criminal restitution orders are not "debts" within the meaning of the Bankruptcy Code because state law affords no "right to payment" to either the victim or the court system. Although the victim is incidentally benefitted, the goal of restitution is not repayment of money, but enforcement of state criminal laws and rehabilitation of criminal defendants. Neither the victim nor the court system stands in the shoes of a civil creditor with attendant civil remedies for debt collection.

As a matter of federal law and statutory construction, criminal restitution orders are not "debts" because Congress has not clearly expressed an

intention that they be considered "debts." When, as here, a proposed interpretation of the Bankruptcy Code would alter pre-Code law and affect state and federal interests of great importance, the Court has required indications of Congressional intent to support the proposed interpretation with unmistakeable clarity. Neither the language of the Code, nor its legislative history, clearly indicates that Congress intended, by enacting the Code, to make criminal judgments "debts."

ARGUMENT

A CRIMINAL RESTITUTION ORDER IS NOT A DEBT ENCOMPASSED BY THE BANKRUPTCY CODE.

The issue reserved in Kelly, whether criminal restitution orders are "debts", is of enormous importance to the states' administration of criminal justice. Restitution is permitted as a sentencing option in all states (Petition, p. 26). If restitution orders are "debts," the Commonwealth of Pennsylvania alone will be unable to enforce the more than 5,000 criminal sentences of restitution entered each year, in the event the individuals sentenced choose to file bankruptcy petitions. (Petition pp. 26-27). The Court in Kelly recognized that such a holding would lead to the "unseemly" result of requiring state prosecutors to

submit the judgments of their criminal courts to federal bankruptcy courts, could lead to "federal remission of judgments imposed by state criminal judges," and in turn would "hamper the flexibility of state criminal judges in choosing the combination of imprisonment, fines and restitution most likely to further the rehabilitative and deterrent goals of state criminal justice systems." 479 U.S. at 48-49. Limiting the flexibility of sentencing options available to judges short of incarceration can only exacerbate current problems of prison overcrowding. As demonstrated below, the result the Court of Appeals reached in this case is not only "unseemly," but inconsistent with the language, history, and purpose of the Bankruptcy Code.

A. A Criminal Restitution Order is Not a "Right to Payment" and Therefore Not a "Debt" Within the Meaning of the Bankruptcy Code.

The Code defines a "debt" as a "liability on a claim," 11 U.S.C. § 101(11), and a "claim" as a "right to payment, whether or not such right is reduced to judgment, liquidated or unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured." 11 U.S.C. § 101(4)(A).[5] The petitioners submit that in Pennsylvania, neither the

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[5]The Code also defines "claim" in equitable terms as a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;" 11 U.S.C. § 101(4)(B).

victim of a crime nor the Probation Department possesses a "right to payment" of a restitution order, and that such order therefore is not a "debt" within the meaning of the Bankruptcy Code. The discharge provisions of § 727 and § 1328 operate only to discharge "any debt." Thus, whatever may be the nature of a criminal's obligation to make restitution, if it is not a "debt," the bankruptcy court has no authority to discharge it.

1. Whether a "right to payment" exists is a question of state law, In re Frenville, 744 F.2d 332, 337 (3d Cir. 1984), cert. denied, 469 U.S. 1160 (1985), but as a general matter it is clear that the purposes of criminal restitution are quite distinct from those of compensation for loss. In

Kelly the Court observed that the context in which a criminal restitution order is imposed undermines the conclusion that it is a judgment for the benefit of the victims. 479 U.S. at 35. The Court observed that the victim has no control over the decision to order restitution or the determination of the amount and that this decision generally turns not on the victim's injury, but on the penal goals of the state and the situation of the defendant.

> Unlike an obligation which arises out of a contractual, statutory or common law duty, here the obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose.

Id., quoting In re Pellegrino, 42 B.R. 129, 133 (Bankr. D. Conn. 1984). Thus, the focus is not on the debtor/creditor relationship or the collection of a debt, but rather on state penological goals.

The Pennsylvania law governing restitution is similar to the Connecticut law analyzed in Kelly and supports the conclusion that neither the victim nor the Probation Department has a right to payment. When a criminal defendant is convicted of a crime involving theft, conversion or decreasing the value of property, or involving personal injury, the court may impose restitution either as a part of the sentence or as a condition of probation or parole. 18 Pa. Cons. Stat. Ann. § 1106(a)-(c) (Purdon 1983). In the case of welfare

fraud, such restitution is mandatory. Pa. Stat. Ann., tit. 62, § 481 (Purdon Supp. 1989).[6] But cf. Id. at § 1106(c)(1).[7]

Like the Court in Kelly, Pennsylvania Courts recognize that an order of restitution does not amount to an award of damages and that, in fixing

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[6]The statute provides that "any person committing a crime enumerated... shall be ordered to pay restitution of any moneys he has received by reason of any false statement...." The statute permits payment by lump sum, monthly installment, or by any other schedule deemed just by the sentencing court. The time period for making the restitution is not limited by the statute. Ibid.

[7]Notwithstanding the mandatory language of Pa. Stat. Ann. tit. 62, § 481 (Purdon Supp. 1989), there is some authority to suggest that a court must still take the financial resources of the defendant into consideration. See, e.g., Commonwealth of Pennsylvania v. Melnyk, 378 Pa. Super. Ct. 42, 548 A.2d 266 (1988), appeal denied, ___ Pa. ___, 562 A.2d 319 (1989). But see Commonwealth v. Ferguson, ___ Pa. Super. Ct. ___, 552 A.2d 1075 (1988).

Court declared that it had "serious doubts" as to whether Congress intended criminal restitution orders to constitute "debts." Indeed, the Court of Appeals went so far as to state that "facially there is considerable merit" to arguments against treating them as such. Pet. App. 17a-19a.

Nevertheless, the Court of Appeals held that such orders are dischargeable "debts." The Court of Appeals relied upon the idea that Congress intended the broadest possible definition of the word "debt," holding

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that the victim's right to obtain a civil judgment and the Probation Department's right to enforce the restitution order satisfied the Code's "right to payment" requirement. Pet. App. 23a-26a.

The Court of Appeals looked also to Chapter 7, and to the provisions governing the automatic stay of proceedings in other courts. Chapter 7 exempts fines, penalties, and forfeitures from discharge and 11 U.S.C. § 362(b)(1) exempts from the automatic stay the commencement or continuation of criminal proceedings against the debtor. The Court of Appeals reasoned that the exception contained in Chapter 7 would not be necessary if criminal judgments were not "debts," and noted that Congress had expressly excepted criminal proceedings from the automatic stay but

had failed to except criminal judgments from the broad definition of "debts." Pet. App. 30a, 34a.

The Court of Appeals added that its decision "comports with Congress' objective of encouraging debtors to select the repayment option available under Chapter 13, rather than to opt for straight liquidation under Chapter 7," Pet. App. 31a, (footnote omitted) and emphasized the broader discharge available to debtors under Chapter 13.

The Court of Appeals noted this Court's "admonition that 'the States' interest in administering their criminal justice systems free from federal interference is one of the most powerful of the considerations that should influence a court considering equitable types of relief" (Pet. App. 40a, quoting Kelly, 479 U.S. at 49), but said that Congress,

not the courts, must "cure any perceived 'defects' in [the Bankruptcy Code]... which arguably affect state criminal proceedings." Pet. App. 40a.

Judge Hutchinson dissented. Pet. App. 43a-58a. He wrote that "the concerns which prompted the Supreme Court's reservations [in Kelly] require a conclusion that restitution obligations imposed as part of criminal sentences are not debts and therefore are not subject to discharge in bankruptcy." Pet. App. 45a. The broader discharge provisions of Chapter 13 do not, in his view, alter this basic conclusion, nor do they determine in the first instance whether a criminal restitution order is a debt. Pet. App. 58a, n.5. In consideration of the pre-Code treatment of criminal sanctions, the Court's direction in Kelly, and the absence of

clear legislative intent to alter pre-Code practice, Judge Hutchinson could not conclude "that Congress intended such a far reaching intrusion on the states' administration of their criminal justice system as the majority's result entails." Id.

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As a matter of federal law and statutory construction, criminal restitution orders are not "debts" because Congress has not clearly expressed an

intention that they be considered "debts." When, as here, a proposed interpretation of the Bankruptcy Code would alter pre-Code law and affect state and federal interests of great importance, the Court has required indications of Congressional intent to support the proposed interpretation with unmistakeable clarity. Neither the language of the Code, nor its legislative history, clearly indicates that Congress intended, by enacting the Code, to make criminal judgments "debts."

ARGUMENT

A CRIMINAL RESTITUTION ORDER IS NOT A DEBT ENCOMPASSED BY THE BANKRUPTCY CODE.

The issue reserved in Kelly, whether criminal restitution orders are "debts", is of enormous importance to the states' administration of criminal justice. Restitution is permitted as a sentencing option in all states (Petition, p. 26). If restitution orders are "debts," the Commonwealth of Pennsylvania alone will be unable to enforce the more than 5,000 criminal sentences of restitution entered each year, in the event the individuals sentenced choose to file bankruptcy petitions. (Petition pp. 26-27). The Court in Kelly recognized that such a holding would lead to the "unseemly" result of requiring state prosecutors to

submit the judgments of their criminal courts to federal bankruptcy courts, could lead to "federal remission of judgments imposed by state criminal judges," and in turn would "hamper the flexibility of state criminal judges in choosing the combination of imprisonment, fines and restitution most likely to further the rehabilitative and deterrent goals of state criminal justice systems." 479 U.S. at 48-49. Limiting the flexibility of sentencing options available to judges short of incarceration can only exacerbate current problems of prison overcrowding. As demonstrated below, the result the Court of Appeals reached in this case is not only "unseemly," but inconsistent with the language, history, and purpose of the Bankruptcy Code.

A. A Criminal Restitution Order is Not a "Right to Payment" and Therefore Not a "Debt" Within the Meaning of the Bankruptcy Code.

The Code defines a "debt" as a "liability on a claim," 11 U.S.C. § 101(11), and a "claim" as a "right to payment, whether or not such right is reduced to judgment, liquidated or unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured." 11 U.S.C. § 101(4)(A).[5] The petitioners submit that in Pennsylvania, neither the

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[5]The Code also defines "claim" in equitable terms as a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;" 11 U.S.C. § 101(4)(B).

victim of a crime nor the Probation Department possesses a "right to payment" of a restitution order, and that such order therefore is not a "debt" within the meaning of the Bankruptcy Code. The discharge provisions of § 727 and § 1328 operate only to discharge "any debt." Thus, whatever may be the nature of a criminal's obligation to make restitution, if it is not a "debt," the bankruptcy court has no authority to discharge it.

1. Whether a "right to payment" exists is a question of state law, In re Frenville, 744 F.2d 332, 337 (3d Cir. 1984), cert. denied, 469 U.S. 1160 (1985), but as a general matter it is clear that the purposes of criminal restitution are quite distinct from those of compensation for loss. In

Kelly the Court observed that the context in which a criminal restitution order is imposed undermines the conclusion that it is a judgment for the benefit of the victims. 479 U.S. at 35. The Court observed that the victim has no control over the decision to order restitution or the determination of the amount and that this decision generally turns not on the victim's injury, but on the penal goals of the state and the situation of the defendant.

> Unlike an obligation which arises out of a contractual, statutory or common law duty, here the obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose.

Id., quoting In re Pellegrino, 42 B.R. 129, 133 (Bankr. D. Conn. 1984). Thus, the focus is not on the debtor/creditor relationship or the collection of a debt, but rather on state penological goals.

The Pennsylvania law governing restitution is similar to the Connecticut law analyzed in Kelly and supports the conclusion that neither the victim nor the Probation Department has a right to payment. When a criminal defendant is convicted of a crime involving theft, conversion or decreasing the value of property, or involving personal injury, the court may impose restitution either as a part of the sentence or as a condition of probation or parole. 18 Pa. Cons. Stat. Ann. § 1106(a)-(c) (Purdon 1983). In the case of welfare

fraud, such restitution is mandatory. Pa. Stat. Ann., tit. 62, § 481 (Purdon Supp. 1989).[6] But cf. Id. at § 1106(c)(1).[7]

Like the Court in Kelly, Pennsylvania Courts recognize that an order of restitution does not amount to an award of damages and that, in fixing

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[6]The statute provides that "any person committing a crime enumerated... shall be ordered to pay restitution of any moneys he has received by reason of any false statement...." The statute permits payment by lump sum, monthly installment, or by any other schedule deemed just by the sentencing court. The time period for making the restitution is not limited by the statute. Ibid.

[7]Notwithstanding the mandatory language of Pa. Stat. Ann. tit. 62, § 481 (Purdon Supp. 1989), there is some authority to suggest that a court must still take the financial resources of the defendant into consideration. See, e.g., Commonwealth of Pennsylvania v. Melnyk, 378 Pa. Super. Ct. 42, 548 A.2d 266 (1988), appeal denied, ___ Pa. ___, 562 A.2d 319 (1989). But see Commonwealth v. Ferguson, ___ Pa. Super. Ct. ___, 552 A.2d 1075 (1988).

its amount, concern that a victim be fully compensated should not overshadow the primary purpose of rehabilitating the criminal defendant. Commonwealth v. Fuqua, 267 Pa. Super. Ct. 504, 407 A.2d 24, 26 (1979). Thus, although the amount of restitution is limited to the injury sustained by the victim, restitution need not be in that amount; and the court is free to consider, in addition to the extent of injury, "other such matters as it deems appropriate." For one thing, the amount imposed must not exceed the defendant's ability to pay. Commonwealth v. Reed, 374 Pa. Super. Ct. 510, 543 A.2d 587 (1988). Further, the court retains the authority to alter or amend any order of restitution. 18 Pa. Cons. Stat. Ann. § 1106(c) (3)(Purdon 1983).

The criminal defendant makes payment directly to the Probation Department, which passes the payments on to the victim. A restitution order, however, is not the equivalent of a civil damage award; if the criminal defendant fails to make restitution as ordered, the victim has no right of enforcement. Commonwealth v. Mourar, 349 Pa. Super. Ct. 583, 504 A.2d 197 (1986), vacated on other grounds, 517 Pa. 83, 534 A.2d 1050 (1988). Nor does the existence of a restitution order preclude the victim from bringing a civil damages action against the criminal, a right which the restitution statute expressly reserves. 18 Pa. Cons. Stat. Ann. § 1106(g)(Purdon 1982). In Pennsylvania, a victim thus has no "right to payment" of a restitution order.

The Court of Appeals, however, found such a "right to payment" as to the Probation Department, remarking that "there can be no greater enforcement mechanism than the threat of revocation of probation and the threat of incarceration." Pet. App. 25a. In fact, the enforcement capability of the court is rather limited, at least insofar as actual recovery of money or property is concerned. If an offender fails to make restitution, the Probation Department notifies the court and the court orders a hearing to determine whether the defendant is in contempt of court or has violated his probation or parole. § 1106(f). The criminal court first determines whether payment has been made. If it has not, the court considers

at a second hearing whether nonpayment constitutes a violation of probation.[8] Of particular relevance to the right to payment issue, this Court has held in Bearden v. Georgia, 461 U.S. 660 (1983), that a state court cannot constitutionally revoke probation for failure to pay a fine and make restitution without first determining the probationer's ability to pay. Thus, even given a defendant's failure to make restitution, he may not be incarcerated if he lacks the ability to pay. Accord, Commonwealth ex rel. Parrish v. Cliff, 451 Pa. 427, 304 A.2d 158 (1973)(order of incarceration reversed where no ability to pay shown).

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[8]This Court held in Gagnon v. Scarpelli, 411 U.S. 778 (1973), that due process requires preliminary and final revocation of probation hearings.

Futhermore, although in a proper case the court can impose criminal sanctions, neither it nor its probation officers have available civil aids to the recovery of a judgment, such as attachment, levy, or lien.[9]

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[9]The General Assembly of Pennsylvania has authorized seizure or forfeiture of property in a number of specific instances, none of which could be applied to permit seizure of property of criminal defendants for nonpayment of restitution by the Probation Department. For instance, the Controlled Substances Forfeiture Act, 42 Pa. Cons. Stat. Ann. §§ 6801-6802 (Purdon Supp. 1989), contains an extensive forfeiture section covering everything from drug paraphernalia and cars used to transport drugs to proceeds traceable to drug transactions. Id. Gambling devices can be seized pursuant to 18 Pa. Cons. Stat. Ann. § 5513 (Purdon 1983). Property illegally possessed or used in violation of the Liquor Code is subject to forfeiture. Pa. Stat. Ann. tit. 47, § 6-601 (Purdon Supp. 1989).

The Probation Department also lacks the power to attach a criminal defendant's wages.[10] Personal earnings are generally exempt from process in Pennsylvania pursuant to 42 Pa. Cons. Stat. Ann. § 8127 (Purdon Supp. 1988), but may be attached for support, board, or a student loan. Id. It is significant that the domestic relations section[11] can effectuate a wage attachment without further court action once a

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[10]Cf. 42 Pa. Cons. Stat. Ann. §§ 9724 and 9755 (Purdon 1982), which provides that under a sentence of partial confinement the prison superintendent "shall collect the same [the wages earned by the defendant] or shall require the defendant to turn over his wages of salary in full when received...." Id. at § 9755(f)(emphasis added).

[11]The employees of domestic relations sections are staff of the court just as probation officers are. 42 Pa. Cons. Stat. Ann. § 961 (Purdon 1981).

defendant is one month in arrears, 23 Pa. Cons. Stat. Ann. § 4348 (Purdon Supp. 1989), while probation officers have no such authority. Thus, there is no right to payment which is enforceable as might be expected in the normal course of a debtor/creditor relationship. Neither the victim nor the court system stands in the shoes of a civil creditor, with attendant remedies. Federal courts have frequently recognized that a criminal restitution order does not establish a debtor/creditor relationship, and have concluded that a restitution order is not a debt. See note 2, infra.

2. This case is therefore different from cases like Ohio v. Kovacs, 469 U.S. 274 (1985). In Kovacs, a debtor failed to clean up a hazardous waste site as required by an injunction

and a state statute. The State of Ohio appointed a receiver to take control of his assets to recover money to defray cleanup costs. The Court found that under these circumstances statutory obligations did give rise to a right to payment under the Bankruptcy Code. 469 U.S. at 279.[12] The focus in Kovacs, however, was on the recovery of money. Id. at 282-283. The focus here is on enforcement of criminal laws and the rehabilitation of criminal offenders. None of the steps taken in Kovacs to insure repayment have been or could have been taken in this case.

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[12]The Court was careful to point out that its holding did not imply that a discharge would shield the debtor from criminal prosecution or from criminal contempt for failing to obey the injunction. 469 U.S. at 284. The Court also observed that had a fine or monetary penalty been imposed, it would have been nondischargeable pursuant to 11 U.S.C. § 523(a)(7).

A criminal restitution order should not be considered a "debt" because there is no "right to payment" under state law. Under federal law, it is not a "debt" because Congress has not demonstrated a clear intent that criminal judgments be included within the scope of the Bankruptcy Code.

B. Congress Has Not Expressed a Clear Intent to Depart from Pre-Code Law.

A criminal restitution order should not be considered a "debt" under the Bankruptcy Code because pre-Code law did not recognize criminal orders as debts, because Congress did not clearly express an intent to depart from prior law, and because the departure from prior law would have a significant impact on the most important areas of state sovereignty.

1. The Court, and Congress itself, have often required that Congress speak with exceptional clarity when it wishes to infringe on the prerogatives of the States. See, e.g., Dellmuth v. Muth, No. 87-1855, slip op. (U.S. June 15, 1989) (Eleventh Amendment abrogation); Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981) (conditions for receiving federal funds); 28 U.S.C. § 2283 (courts not to enjoin state courts unless expressly authorized). This clarity of expression ensures that the usual constitutional balance between the States and the federal government will be disturbed only when Congres has directly focused its attention on the matter and has explicitly decided in favor of such a change. Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985).

Thus, in construing the Bankruptcy Code, the Court has repeatedly refused to find that the Code altered pre-Code law to the detriment of important state interests, without clear signs that Congress intended this result. Midlantic National Bank v. New Jersey Department of Environmental Protection, 474 U.S. 494 (1986); Kelly v. Robinson, 479 U.S. 36 (1986); and U.S. v. Ron Pair Enterprises, Inc., No. 87-1043, slip op. (U.S. Feb. 22, 1989). In Midlantic, for example, the Court refused to find that the Code had implicitly repealed a pre-Code exception to a bankruptcy trustee's abandonment powers created by the courts out of deference to state health and safety regulations, an interest which the Court in Kelly judged "comparable" to the state

interest in administration of its criminal laws. 479 U.S. at 47.[13] The Court stated that "the normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept it makes that intent specific."[14] Midlantic, 474 U.S. at 501. The Court has followed this

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[13]In holding that criminal restitution orders were not dischargeable in Chapter 7 bankruptcies, the Court observed that criminal fines and penalties were not considered dischargeable under the 1878 Act, the Code's predecessor, and recognized in this judicial exception "a deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings." 479 U.S. at 47.

[14]In Ron Pair, the court noted that the outcome sought in Midlantic would result in not only a departure from pre-Code law but in an extraordinary exemption from non-bankruptcy law thus requiring some "clearer expression of congressional intent." Id., Slip op. at 8.

rule with particular care in construing the scope of bankruptcy codifications, 474 U.S. at 501. The Court in Midlantic, by way of comparison, quoted Palmer v. Massachusetts, 308 U.S. 79, 85 (1939): "If this old and familiar power of the states [over local railroad service] was withdrawn when Congress gave district courts bankruptcy powers over railroads, we ought to find language fitting for so drastic a change." Id. at 501.

The "clear intent" rule as articulated in Midlantic and Kelly applies when the statutory language in question is at least in some degree open to question, represents a departure from pre-Code practice, and, under the proposed interpretation, is in clear conflict with state or federal laws of

great importance. Ron Pair, slip op. at 9-10. The rule of interpretation applies in this case.

2. There can be no question that the Court of Appeals' decision in this case is a drastic departure from pre-Code practice and that it intrudes upon the States' important interest in administering their criminal laws.

The Court in Kelly recognized that "Congress enacted the Code in 1978 against the background of an established judicial exception to discharge for criminal sentences, including restitution orders, an exception created in the face of a statute drafted with considerable care and specificity." 477 U.S. at 46; Ron Pair, slip op. at 9,

n.8.[15] It cannot seriously be questioned that the Court of Appeals departure from pre-Code practice has a significant and direct impact on a central area of state sovereignty -- administration of criminal laws -- again, recognized by the Court in Kelly:

> Our interpretation of the Code also must reflect the basis for this judicial exception, a deep conviction that federal courts should not invalidate the results of state criminal proceedings. The right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the state.

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[15]Although the actual language of the 1898 Bankruptcy Act suggests that penalties owing to the United States or to states were "debts", many courts interpreting the Act had held or stated that criminal fines and penalties were in fact not "debts." See Zwick v. Freeman, 373 F.2d 110, 116 (2d Cir.), cert. denied, 389 U.S. 835 (1967); Parker v. United States, 153 F.2d 66, 71 (1st Cir. 1946); In re Abramson, 210 F. 878, 880 (2d Cir. 1914); In re Moore, 111 F. 145, 149-50 (W.D.Ky. 1901).

479 U.S. at 47. In Ron Pair, the Court emphasized that "[i]n Kelly as in Midlantic, pre-Code practice was significant because it reflected policy considerations of great longevity and importance." Slip op. at 9. Thus, the Court should not conclude that Congress has in the Code altered the prior law with respect to criminal sanctions unless it has expressed an intent to do so with unmistakeable clarity.

3. The broad definitions of "debt" and "claim" are insufficient to alter pre-Code law because nowhere in the Code's language or in its legislative history does Congress demonstrate a clear intent that criminal sanctions, including restitution orders, were meant to be embraced within the scope of "debts" under the Bankruptcy Code. Although the language of § 101(4) and

(11), which defines "debts" and "claims," is admittedly broad, breadth of language alone, without some further specific evidence of legislative intent, is not sufficient to work a change in prior bankruptcy law where important state and federal interests are affected. The language of § 101(4) is no more broad than that which the Court found insufficient to alter pre-Code law in Midlantic. In that case, the Court analyzed Code provisions which authorized a bankruptcy trustee to abandon property. The statutory language was quite broad, and was termed by the dissent "absolute in its terms" 474 U.S. at 509 (Rehnquist, J., dissenting):

> After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate.

11 U.S.C. § 554(a) (amended 1984).

Despite the breadth of this language, the Court refused to find that Congress had implicitly abrogated a pre-Code limitation on abandonment powers which the courts had created out of a deference to legitimate state and federal interests -- in the case of Midlantic, state environmental concerns that Congress shared. 474 U.S. at 506.[16]

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[16]In the course of reaching this decision, the Court explicitly rejected a rationale posited by the Third Circuit in this case: that Congress' inclusion of specific exceptions to the automatic stay provision of § 362 for criminal proceedings suggests, by its failure to include similar exceptions to the definition of debt, that Congress intended that criminal judgments be included within its scope. Pet. App. 34a. The Court noted that, while the

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Furthermore, in Kelly the Court acknowledged that the Code's definition of "debt" is broadly drafted and that the Code's legislative history, as well as its priority and dischargeability provisions, support a broad reading. Yet the Court still observed that

> [n]othing in the legislative history of these sections compels the conclusion that Congress intended to change the state of the law with respect to criminal judgments.

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judicial exceptions to the trustees' abandonment powers were firmly established by 1978, Congress in the Code was broadening the scope of the automatic stay and hence had to limit the new power expressly. 474 U.S. at 504. This case is the same. The exceptions for criminal orders were firmly in place when the Code was enacted. Kelly, 479 U.S. at 46.

479 U.S. at 50, n. 12. In fact, the problems and concerns which Congress expressed as being addressed in the new Code have nothing to do with discharging criminal judgments. The Senate Report defines the general purpose of the reform as a modernization designed to address changes in the law of debtor-creditor relations, including adoption of the Uniform Commercial Code and the spread of consumer credit, S. Rep. No. 989, 95th Cong., 2d Sess. 2 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5788. The House identified the same developments as prompting the need for modernization, and identified as other problems the need for overhaul of the bankruptcy court system and the inadequacy of relief under the Bankruptcy Act available

to consumer debtors. H.Rep.No. 595, 95th Cong., 2d Sess. 3-5, reprinted in 1978 U.S. Code Cong. & Admin. News 5963, 5965-5966.[17]

There is nothing in the legislative history of the Code to demonstrate that, by enacting it, Congress knew it

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[17]The discussion concerning Chapter 13 similarly does not express an intent to alter the law with respect to criminal sanctions. The Senate Report identifies five problems with respect to this section of the Act: limitations on eligibility of individuals with regular income; limitations on hardship discharges; erratic treatment of secured creditors; problems with accomodation co-debtors in consumer finance; and problems with formal creditor voting. S.Rep No. 989, 95th Cong., 2d Sess. 13, reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5799. The House Report is somewhat less sanguine, but nowhere does it identify treatment of criminal sanctions under the Act as a problem to be remedied under Chapter 13 of the Code. H.R.Rep. No. 595, 95th Cong., 2d Sess. 118-125, reprinted in 1978 U.S. Code Cong. & Admin. News 5963, 6079-6086.

was making criminal judgments "debts" potentially dischargeable in bankruptcy. To the contrary, there is the clear expression of intent that "[t]he bankruptcy laws are not a haven for criminal offenders." H.R. Rep. No. 595, 95th Cong., 2d sess. 342, reprinted in 1978 U.S. Code Cong. & Admin. News 6299.

4. Further, it is not permissible to infer, as did the Court of Appeals, that by enacting the exception to discharge contained in § 523(a)(7) and by failing to incorporate that exception in the discharge provisions of § 1328(a), Congress established by implication that a criminal judgment is a "debt" and that it is dischargeable in Chapter 13 bankruptcies. The statutory language is not definitive, the legislative history is unrevealing, and

the Court has refused to find abrogation of pre-Code law by implication. Section 523(a) excepts from discharge "debts":

> (7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty --
>
> (A) relating to a tax of a kind specified in paragraph (1) of this subsection; or
>
> (B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition.

First, the statutory language does not definitively resolve whether criminal penalties are "debts." Like only two other exceptions to discharge encountered in § 523(a), it uses the language "to the extent such debt is for ..." See also 11 U.S.C. § 523(a)(5)(A),

523(a)(9). It thus leaves entirely open whether a penalty such as criminal restitution is to any extent a "debt."

Second, the Court has required greater clarity of intent than the mere implication that, by enacting the exception, Congress acknowledged that criminal judgments were "debts." In Midlantic and in Kelly, the Court has expressed its unwillingness to countenance implicit or "silent abrogation" of judicial concepts engrafted into pre-Code practice which affect important state or federal interests. Kelly, 479 U.S. at 36.

Finally, the legislative history of § 523(a)(7) does not support a departure from pre-Code treatment of criminal sanctions. The absence of legislative history may be considered in

a case such as this. Kelly, 479 U.S. at 50-51. Pointing to the absence of relevant legislative history to support a conclusion that Congress intended a discharge in bankruptcy to void criminal restitution orders, the Court in Kelly observed that "[i]f Congress had intended, by § 523(a)(7) or by any other provision, to discharge state criminal sentences, we can be certain that there would have been hearings, testimony, and debate concerning consequences so wasteful, so inimical to purposes previously deemed important, and so likely to arouse public outrage." Id. at 51, quoting TVA v. Hill, 437 U.S. 153, 209 (1978) (Powell, J., dissenting).

There is no such testimony or debate. In fact, although in Kelly this Court found § 523(a)(7) a codification of the judicially created exception to discharge for criminal fines, one could

as easily conclude from an examination of the remainder of § 523(a)(7) and the pertinent discussion of the Senate Judiciary Committee Report on the then proposed Bankruptcy Code, both of which discuss tax-related matters, that Congress in enacting § 523(a)(7) intended to address the status of civil tax penalties, not criminal sanctions.[18]

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[18]The Senate Report provides: "Paragraph (7) makes nondischargeable certain liabilities for penalties including tax penalties if the underlying tax with respect to which the penalty was imposed is also nondischargeable (sec. 523 (a)(7)). These latter liabilities cover those which, [sic] but are penal in nature, as distinct from so-called 'pecuniary loss' penalties which, in the case of taxes, involve basically the collection of a tax under the label of a 'penalty.' This provision differs from the bill as introduced, which did not link the nondischarge of a tax penalty with the treatment of the underlying tax. The amended provision

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Thus, the legislative history lends no support to the conclusion that by enacting the exception Congress intended to recognize criminal judgments as "debts."

Taken together, neither the language of the Code nor its legislative history evidence, with the unmistakeable clarity the Court has required, that Congress intended to alter pre-Code law and intrude on so fundamental a matter of state sovereignty as the administration of criminal law.

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reflects the existing position of the Internal Revenue Code [Title 26] (Rev. Rul. 68-574, 1968-2 C.B. 595)." S. Rep.No. 989, 95th Cong., 2d Sess. 79 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 5865. Although the paragraph seems to be missing a line, the Report clearly reveals the Senate Judiciary Committee's intention that § 523(a)(7) address the dischargeability of civil tax penalties such as those authorized in 26 U.S.C. §6651 et. seq. Thus construed, §523(a)(7) focuses on an issue that had generated much litigation and uncertainty under the 1898 Bankruptcy Act. See 3 Collier on Bankruptcy ¶57.22[2], [2.1] (14th ed. 1977).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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